



**The Court of Justice in times of politicisation  
'law as a mask and shield' revisited**

Blauberger, Michael; Martinsen, Dorte Sindbjerg

*Published in:*  
Journal of European Public Policy

*DOI:*  
[10.1080/13501763.2020.1712460](https://doi.org/10.1080/13501763.2020.1712460)

*Publication date:*  
2020

*Document version*  
Peer reviewed version

*Citation for published version (APA):*  
Blauberger, M., & Martinsen, D. S. (2020). The Court of Justice in times of politicisation: 'law as a mask and shield' revisited. *Journal of European Public Policy*, 27(3), 382-399.  
<https://doi.org/10.1080/13501763.2020.1712460>

# The Court of Justice in times of politicization: 'law as a mask and shield' revisited

Michael Blauberger & Dorte Sindbjerg Martinsen (2020)

*Journal of European Public Policy*, 27:3, 382-399

<https://www.tandfonline.com/doi/full/10.1080/13501763.2020.1712460>

**Abstract:** This contribution analyses if and under what conditions bottom-up pressures constrain the Court of Justice of the European Union (CJEU). Neofunctionalists famously explained the power of the Court by its use of 'law as a mask and shield'. Due to its technical nature, the Court is able to mask the political substance of 'integration through law' and to shield it from political challenges. We revisit this argument in times of politicization of the EU and develop a typology of four constellations depending on different kinds of bottom-up pressures. We argue that depoliticized integration through law still functions, to varying degrees, in face of *either* governmental contestation *or* public politicization. By contrast, if member state governments and the public *jointly* oppose further integration through law, the Court is constrained as further expansive jurisprudence could even reinforce politicization and risk political backlash. We illustrate our argument with case law on EU citizenship.

**Keywords:** Court of Justice, EU Citizenship, Integration through Law, Neofunctionalism, Politicization

## Introduction

Among all major EU institutions, the Court of Justice of the EU (CJEU) is the least likely to be affected by the bottom-up politicization of EU decision-making. The Court has been famously described as 'tucked away in the fairyland Duchy of Luxembourg' (Stein 1981: 1) to stress the remoteness of European judges from EU political battles, let alone broader public attention. As with any court, the CJEU's authority rests on its perception as a non-political actor, settling conflicts by technical-legal means, and hence, CJEU judges have no interest in becoming agents of politicization. Rather, the Court's ability to depoliticize conflicts is a crucial precondition for its role as an engine of integration. Due to its technical-legal nature, neofunctionalists have argued, law serves as a 'mask and shield', which obscures the political substance of CJEU jurisprudence and protects it from political challenges.

And yet, the CJEU is not immune against bottom-up pressures. Escaping the 'dictate' from Luxembourg was a major issue during Brexit negotiations. More generally, research on courts and politics has shown that judges do not rule in a political vacuum, but are responsive to changes in the broader 'political

mood’(McGuire and Stimson 2004). Against the background of increasing EU politicization, we therefore revisit Burley and Mattli’s classical argument about ‘law as a mask and shield’.

We develop a typology of four constellations depending on whether CJEU jurisprudence is subject to bottom-up pressures stemming from member state governments and/or politicization. Based on our distinction of bottom-up pressures, we qualify the ‘mask and shield’ argument in two respects. First, even if ‘shielded’ against outright political attacks, CJEU jurisprudence remains vulnerable to governmental contestation by legal means. Integration through law scholars underestimated member states’ ability to contain the *impact* of expansive CJEU jurisprudence through creative compliance at the domestic level and legislative corrections at the EU level. Second, we argue that the Court faces a ‘constraining consensus’ if further *expansive jurisprudence* is not only contested by member state governments, but faces also public politicization. Under these circumstances, judges have to choose between self-restraint and the risk of political backlash (Madsen et al. 2018).

The following theoretical section briefly summarizes the original neofunctionalist account, before we develop our own argument and typology of different constellations of CJEU contestation. Subsequently, we illustrate these four ideal typical constellations with empirical evidence from the area of EU citizenship, complemented with examples from other policy areas. The concluding section discusses the prospects of further Court-driven integration through law in times of politicization.

## Law as a Mask and Shield Revisited

### The original argument

In their seminal article ‘Europe before the Court’ from 1993, Anne-Marie Burley and Walter Mattli applied neofunctionalist theory to explain the CJEU’s strength as an engine of integration (Burley and Mattli 1993). The Court, they argued, often ruled in favor of further integration to an extent that goes significantly beyond what could be reached by the political agreement of governments alone. Crucially, this integration through law depends on the distinctiveness of the legal domain:

*‘Law functions as a mask for politics, precisely the role neofunctionalists originally forecast for economics. The need for a ‘functional’ domain to circumvent the direct clash of political interests is the central insight of neofunctionalist theory. This domain could never be completely separated from the political sphere but would at least provide a sufficient buffer to achieve results that could not be directly obtained in the political realm’ (Burley and Mattli 1993: 44).*

Burley and Mattli linked their argument already explicitly to (de)politicization: ‘The strength of the functional domain as an incubator of integration depends on the relative resistance of that domain to

politicization' (ibid.: 44). Court judgments appear as 'technical', they deny the 'existence of policy discretion' and provide 'nonpolitical justification(s)' for 'purportedly neutral' decisions, which derive from their 'distinctive methodology and logic', in short: they follow the 'inexorable logic of law' (ibid.: 69-73). Due to these characteristics, case law 'functions both as a mask and shield' (ibid.: 74). The political implications of judgments are hidden behind their technical-legal language. And as long as no one wants to call the Court's general authority into question, individual rulings are protected from outright political contestation, i.e. politically unwelcome case law can only be challenged on its own legal terms.

While Burley's and Mattli's argument deals with the depoliticizing effect of law and courts in general, it applies particularly to the EU context. Appointments to the CJEU are much less prone to politicization than, for example, to the US Supreme Court (Ferejohn 2002: 65), and the selection process of CJEU judges has been largely professionalized on the basis of the Lisbon Treaty (Dumbrovsky et al. 2014). Moreover, apart from efficiency considerations, internal decision-making at the CJEU remains largely shielded from public scrutiny. While greater openness and transparent reasoning might arguably improve the legal quality of the Court's jurisprudence (Weiler 2013), European judges have always cared greatly about maintaining the non-political appearance of their case law, e.g. through the short and apodictic style of many judgments, the confidentiality of their internal decision-making and the absence of dissenting opinions.

## Two qualifications

25 years after its original publication, the 'law as a mask and shield' argument is still one of the most prominent accounts of CJEU-driven integration through law; arguably holding a similar status as standard reference among political scientists as Joseph Weiler's 'Transformation of Europe' (1991) in the legal field. Yet, the neofunctionalist argument is not uncontested. Empirically, it has been noted that Burley and Mattli offered little evidence for their argument beyond the evolution of CJEU legal doctrine itself (Stone Sweet 2010: 16). Subsequent research delivered strong support for some of their claims, e.g. regarding the enabling role of subnational actors such as domestic courts, lawyers and private litigants (Alter 1998a; Cichowski 2004; Kelemen 2011; but see also Conant et al. 2018 for many open questions regarding EU legal mobilization). Theoretically, historical institutionalists explained the acceptance of expansive CJEU jurisprudence alternatively by emphasizing the short time horizons of politicians rather than the inherent qualities of law (Pierson 1996; Alter 1998b). Moreover, it has been criticized that neofunctionalists were largely ignorant of the limitations of integration through law (Alter 1998b: 121). And indeed, Burley's and Mattli's original account shows only little concern for potential qualifications of the 'mask and shield' argument: in order to be accepted as law, CJEU

jurisprudence just needs to exhibit ‘a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning’ (Burley and Mattli 1993: 44) and in order not to lose its overall legitimacy, the Court must not ‘outrun its constituency’ (Mattli and Slaughter 1998: 181).

In the following, we do not seek to present an alternative account, but we introduce two qualifications concerning both the shield and the mask aspects of CJEU jurisprudence, which are inspired by recent research on (i) judicial impact and on (ii) politicization.

First, the shield of EU law is not impenetrable. When confronted with unwelcome case law, EU member state governments typically do not challenge the Court’s overall authority politically, but they may seek to limit the Court’s impact by legal means. Burley and Mattli captured judicial impact only partially. Although they defined their dependent variable in terms of a ‘gradual penetration of EC law into the domestic law of its member states’ (Burley and Mattli 1993: 43), their empirical analysis focused on the development and acceptance of CJEU legal doctrine rather than on broader policy impact. Probably the most radical way to limit the Court without questioning its existing authority is the exclusion from new areas of integration (ibid.: 74). Apart from exclusion, a growing body of research on CJEU judicial impact has analyzed member states’ more subtle ways to control and limit the effects of expansive jurisprudence. At the European level, member states may adopt secondary legislation to modify the implications of existing and to preempt future case law. Whereas outright legislative override of CJEU jurisprudence is rare, member states have been found to draft secondary legislation carefully in order to circumscribe the Court’s policy impact (Martinsen 2015). At the domestic level, the impact of unwelcome Court jurisprudence may be effectively limited in the process of implementation. As with legislative override at the EU level, member states rarely opt for open non-compliance at the domestic level. Rather, they resort to creative forms of compliance, e.g. by limiting the Court’s impact to the individual conflict at issue (Conant 2002) or by carefully designing domestic reforms ‘with Luxemburg in mind’, which are likely to survive future lawsuits while minimizing substantive policy change (Blauberger 2012).

Secondly, the political substance of the Court’s case law has become harder to mask. Burley and Mattli wrote their original piece still under the impression of the ‘permissive consensus’ (Hooghe and Marks 2009). Since then, politicization of European governance has increased in terms of visibility, polarization and engagement beyond elite actors (de Wilde et al. 2016; Bressanelli et al. 2019). And, closely linked to this overall trend, CJEU jurisdiction has come to involve ever more politically sensitive issues such as citizenship or welfare rights, which forces the Court to engage in delicate value judgments and interest evaluations (Kelemen 2016: 126f.). As a consequence, even when adhering perfectly to legal methodology and existing doctrine, CJEU judges may be confronted with

politicization. Particularly, the visibility or salience dimension of politicization is important for our discussion of bottom-up pressures on the Court. Arguably, actor expansion might rather reinforce EU legal mobilization (cf. Kelemen 2011) and polarization might increase CJEU independence as it reduces the risk of politically agreed counter-action (Larsson and Naurin 2019: 12). By contrast, if politicization involves salient public opposition against further integration in an area of CJEU jurisdiction, it can have a constraining effect on the Court. Studies on domestic high courts have shown that public opinion places a constraint on judicial decision-making and that judges respond to changes in the broader political context (McGuire and Stimson 2004). Recent research on international courts also emphasizes the importance of contextual factors for judicial authority (Alter et al. 2018), including diffuse public support or opposition. Even if the vast majority of CJEU judgments do not reach broad visibility, newly collected data on newspaper coverage of CJEU jurisprudence shows that a considerable share of case law is in fact reported by main European newspapers (Dederke 2018: 18). Moreover, there is empirical evidence that CJEU actually do ‘read the morning papers’ (Blauberger et al. 2018).

#### Four constellations of CJEU contestation

Following from the preceding discussion, we distinguish two kinds of bottom-up pressures for the Court. On the one hand, a large part of the political science literature on the CJEU takes a state-centric approach and addresses the Court’s relationship to member state governments. Essentially, the question is how far CJEU judges can go in promoting integration through law and making it effective even against opposition from member state governments. While we cannot define a precise cut-off point of how many member governments constitute a bottom-up pressure on the Court, governmental contestation is typically regarded to be greater, the more member governments oppose an expansive EU legal interpretation in their written observations to the Court (Larsson and Naurin 2016: 396; Carrubba and Gabel 2015: 84). On the other hand, we add public politicization as a separate kind of bottom-up pressure potentially affecting the Court’s independence and impact.

Combining these two kinds of bottom-up pressures, four constellations of Court contestation are possible (see Table 1) and each constellation has different implications for the Court’s strategic responses and their effectiveness in promoting integration through law. In constellation I, the Court is largely unconstrained by governmental contestation and public politicization: integration through law is effective even without particular depoliticizing efforts. In constellations II and III, the Court is faced with bottom-up pressures from *either* public politicization *or* governmental contestation: both, ‘law as a mask’ and ‘law as a shield’ are responses of ‘assertive depoliticization’ (Bressanelli et al. 2019), i.e. they enable the Court to rule expansively despite bottom-up pressure. Finally, in constellation IV, public politicization *and* governmental contestation constitute a ‘constraining consensus’ for the

Court: a strategy of judicial self-restraint is necessary to protect the Court's recognition as a non-political institution and to avoid political backlash more generally.

|                           |     | Public politicization       |                                |
|---------------------------|-----|-----------------------------|--------------------------------|
|                           |     | No                          | Yes                            |
| Governmental contestation | No  | (I)<br>Permissive consensus | (II)<br>Law as a mask          |
|                           | Yes | (III)<br>Law as a shield    | (IV)<br>Constraining consensus |

**Table 1: Four constellations of CJEU contestation**

(I) Unsurprisingly, the Court is least constrained in its role as an engine of integration in the absence of both, governmental contestation and public politicization. Arguably, this constellation has predominated for the long period of the 'permissive consensus' and in particular in the core area of EU single market integration. The public exhibited a permissive attitude to elite-driven integration in general and largely ignored the 'quiet revolution' (Weiler 1994) with the Court as the 'unsung hero' of integration (Burley and Mattli 1993: 43) in particular. Member state governments disliked some rulings, but generally welcomed the Court's role in overcoming political obstacles to European market integration. Even if individual judgments were met with opposition from one or two governments, this hardly constrained the Court. As disagreement over the direction and contents of law are defining features of law-making (Madsen et. al. 2018: 202), contestation by individual member states hardly constrains the court or challenges its authority – but merely constitutes business as usual (Larsson and Naurin 2016: 392; Hofmann 2018).

(II) Burley's and Mattli's original argument about law as a mask mainly referred to the Court itself 'masking' the political implications of its jurisprudence. We amend this argument in light of our two qualifications above. Given that member state governments have become more alert to Court-driven integration over time, they can unmask unwelcome integration through law more readily. However, they may prefer and protect the mask of law in light of public politicization, i.e. whenever they share the Court's interest in promoting integration, but shy away from taking the political responsibility for unpopular decisions. As a consequence, the function of law as a mask is most powerful when the Court and member state governments collude. Under these circumstances, governments may prefer to shift decision-making to the seemingly neutral area of the judiciary, while tacitly agreeing with the political substance of Court-driven integration through law. By arguing 'We are sorry, but it's the law', member state governments can at least partly shift the blame to the Court. At the same time, the Court's

authority remains unquestioned and member state governments do not undermine the impact of its jurisprudence.

(III) The Court can use law as a shield most forcefully, when governments are opposed to a specific ruling, but their opposition is not paralleled by strong public politicization of that issue. In this constellation, the Court has a particular interest in delivering high quality judgments, which are difficult to challenge on legal grounds. References to established precedent serve to emphasize overall legal coherence and certainty (Schmidt 2012: 10) and to justify further expansionary jurisprudence: ‘where the “mask of law” has already fallen ... the Court argues more carefully, by means of reference to precedent’ (Larsson et al. 2016: 881). Under these circumstances, any attempt to deliberately politicize and to openly resist the Court’s jurisprudence is likely to backfire for member state governments. Throughout the union, citizens tend to have greater trust in the CJEU than in their own government (or, actually, any other EU institution, see Kelemen 2012: 48f.). Moreover, even if governments are very unhappy with an individual judgment, questioning the general authority of an otherwise functional court would be a high price to pay. Consequently, they seek ways to limit the impact of CJEU jurisprudence by legal means, e.g. through legislative modification at the EU level or creative compliance domestically (Hofmann 2018). Such measures may contain the impact of individual rulings considerably, but by countering the case law on its own legal terms, they do not call into question the Court’s overall authority.

(IV) Finally, CJEU judges may become confronted with the fourth constellation: a ‘constraining consensus’ where governmental contestation occurs together with public politicization. While ‘law as a mask’ crucially depends on the collusion of governments and while law ‘shields’ the Court from political attacks without public resonance, both protective mechanisms fail in face of joint opposition from member state governments and the general public. This constellation occurs rarely since CJEU judgements usually do not reach broad visibility while at the same time being collectively opposed by several governments. Such bottom-up pressure is most likely to arise when the Court develops innovative rulings against the expressed intent of the EU legislature which affect matters of high political significance (Hofmann 2018: 260; Madsen et. al. 2018: 205). If, however, the Court continues to drive integration against such a ‘constraining consensus’, it risks being perceived as a political actor who can also be challenged in political terms. Contestation, then, will not just aim at reducing the impact of individual rulings, but target the Court’s general authority to rule expansively. Under these circumstances, the technical complexity of case law may even have the inverse effect of what neofunctionalists described, i.e. populists may (ab)use the opaque and complex character of individual cases and paint ‘law as a caricature’ to make vastly exaggerated anti-EU claims. As a consequence, we would expect CJEU judges to back down in the face of a ‘constraining consensus’ and to limit or even



reverse expansive jurisprudence. Even if this scenario occurs only rarely, its relevance may be broader, namely if CJEU judges exert self-restraint in anticipation of possible backlash.

In sum, our typology refines the original mask and shield argument by specifying the constellations under which each of these functions of law plays a particular role and by adding public politicization as an important contextual factor for European judges. It implies one basic hypothesis: effective integration through case law becomes less likely as we move from constellations (I) to (IV). Apart from the law itself, the Court is least constrained (I) under a permissive consensus and (II) when law serves as a mask. The Court may (III) continue to rule expansively even against member state opposition and use law as a shield against outright political attacks, but the impact of expansive jurisprudence is limited. Finally, (IV) under the rare constellation of a constraining consensus, the Court is limited not only with respect to its impact, but in its ability to rule expansively in the first place.

## **Empirical illustration**

In the following, we illustrate these four ideal typical constellations with empirical evidence from a joint project on the free movement and equal treatment of EU citizens, complemented with well-researched examples from other policy areas. We, thereby, focus on a rather extreme set of cases, which are not meant to ‘test’ causal hypotheses or ‘represent’ CJEU case law in general. Instead, these cases are particularly useful for illustrative purposes as they come close to the ideal types conceptualized above and they cover the full spectrum of our typology. First, while case law on the free movement of workers reaches back to the earliest phases of integration and of the permissive consensus, it is arguably the area in which the Court ruled most strongly against member state opposition (Larsson and Naurin 2016: 396). Secondly, while many CJEU judgments do not reach any public attention (Dederke 2018: 18), the free movement of EU citizens and especially their cross-border access to social welfare has become increasingly politicized in recent years. We have thus chosen a set of cases where legal integration has occurred for long and considerably, while at the same time politics is a play (Martinsen 2015: 10).

### **(I) Permissive consensus**

In terms of producing cases, the CJEU has been remarkably effective. Between 1961-2014, the Court decided in more than 7000 preliminary rulings and infringement proceedings (Martinsen 2015: 11). Most cases have concerned agriculture and fisheries, second comes internal market interpretations concerning free movement of goods and thirdly judicial decisions within the social realm. Arguably, the largest pile of these cases were never politically controversial, but merely rather technical legal

disputes, relevant for the parties involved but without broader implications. However, famous cases such as *Van Gend en Loos* and *Costa v. E.N.E.L.* from 1963-1964 certainly fall in this category of integration through law and were enabled by a permissive consensus. New historical research has shown that these landmark cases did indeed cause some political concern, but the majority of governments did not mobilize against the new legal order constructed (Rasmussen 2017).

Expansive CJEU jurisprudence has largely shaped the free movement and equal treatment of workers for decades, enabled by the permissive consensus. Originally, the right to cross-border welfare in the European Union was restricted to workers by means of Regulation 1612/68 (now 492/2011) and Regulation 1408/71 (now 883/2004), entitling Community migrant workers to equal treatment with national citizens on social rights and tax advantages next to exporting social-security rights across member-states borders. This original regulatory framework of the 1960s has gradually extended its personal and material scope by means of CJEU case law and legislative revisions. The Court's early jurisprudence laid down that the purpose of the Treaty was to establish as 'complete a freedom of movement for workers as possible' (Case 75/63 *Hoekstra*). It later extended the personal scope to also include the self-employed (Case 17/76 *Brack*) and clarified the rights of the family members (Case 7/75 *Fracas*; C-308/93 *Cabanis-Issarte*). In addition, a permissive consensus allowed the Court to develop an inclusive concept of who is a worker according to EU law. In the case of *Kempf* (C-139/85), the CJEU established that working 12 hours per week would suffice, and in the case of *Megner and Scheffcl* (C-444/93), it ruled that 10 hours of work per week did not exclude a person from being regarded as a worker.

EU gender equality has been another often cited cluster of case law, used to illustrate the power of integration through law (Cichowski 2004). The *Defrenne* cases from 1971 and 1976 were crucial in defining the meaning and effect of the Treaty's declaration on equal pay and initiated an important process of judicial and political integration, which proved that litigation can be an important tool to push for change. In the *Defrenne II* case from 1976, a Belgian Court asked if the Treaty's article 119 had direct effect, creating enforceable rights for individuals in national courts without EU secondary legislation or national legislation transposing it. The Court disregarded objections by the UK and Ireland and confirmed the direct effect of article 119. Other important cases followed as for example *Danfoss* (C-109/88) on equal pay and *Dekker* (C-177/88) concerning the rights of pregnant workers among many others. The Court's jurisprudence was later codified into important pieces of secondary legislation (see for example the burden of proof directive 97/80 adopted in 1997). A large part of gender equality case law occurred without any significant governmental contestation despite their political and also financial implications. Although some member states disliked the rulings, there was no broader collective mobilization or public politicization for or against them.

## (II) Law as a mask

While law may hide political conflict in various ways, e.g. when the broader and long-term consequences of individual rulings go unnoticed by member state governments, the aspect of law as a mask is essential when governments tacitly endorse integration through law, but do not want to overtly take political responsibility. Theoretically, such a scenario in which governments shift decision-making (and blame) for unpopular decisions is highly plausible, but empirically, these cases are inherently difficult to document. The Court's role in these cases lies precisely in serving as a forum in which governments can hide politically conflictual issues behind a mask of technical, legal reasoning. And governments are assumed to remain silent or even to delude the public about their actual preferences.

Nevertheless, we can draw on some well-researched examples from the posting of workers to illustrate this constellation. The question of which labor standards apply to workers, who are posted from one EU member state to another, was at the heart of the 'Laval quartet' (Blauberger 2012). In three of these four landmark judgments, the Court interpreted the Posting of Workers Directive extensively and ruled against national restrictions of the free movement of services (Martinsen 2015). The cases were mainly perceived as pitting old against new EU member states, with the CJEU favoring further liberalization and, thus, siding with new EU member states (Lindstrom 2010). And yet, there is considerable evidence that the Court rulings were also received with the tacit approval of some conservative-liberal governments in the old member states. The *Rüffert* judgment (C-346/06) had the greatest impact in those German regions governed by conservative-liberal coalitions, where it was used to abolish the contested domestic rules without replacement (Sack 2012). The *Laval* judgment (C-341/05) triggered various domestic reform processes, which went furthest in Sweden, where a conservative-liberal government was under strong influence from major business interests (Seikel 2015). Arguably, in these cases, the mask of EU law worked better for the governments involved than for the CJEU itself. Since these cases were already politicized when they reached the Court, European judges were hardly able to mask the underlying political conflicts and had to take inevitably unpopular rulings. By contrast, the Court's rulings enabled liberal-conservative governments to enact domestic reforms, which could be portrayed as EU legal necessities.

Another policy area in which EU law typically serves to mask political conflict is the control of state aid. Over time, the Commission has been able to incrementally tighten the control of state aid in the EU, largely supported by the CJEU, but also with the tacit agreement of member state governments (Blauberger 2009). Governments share a collective interest in avoiding subsidy races and reaping the benefits of undistorted competition, but they are vulnerable to political pressures from potential beneficiaries among their constituents. For example, governments are regularly called upon to save

domestic enterprises (and their jobs) from bankruptcy by granting state aid. Under these circumstances, governments often readily refer to the constraints imposed by EU rules to deny state aid, while shifting the ultimate responsibility and blame to the European level.

### (III) Law as a shield

The case law on the free movement of workers post-Maastricht offers plenty of evidence on how the Court's jurisprudence is shielded from outright political attacks despite challenges by member state governments. Since Maastricht, the Court has significantly extended the rights to move freely and to be treated equally from workers to EU citizens more generally (Wollenschläger 2011). The actual impact of the Court's citizenship jurisprudence, however, has been more limited. Already before the Court has shifted its own course (see next section), member state governments have effectively limited its impact through legislative modification at the EU level and contained compliance at the domestic level. Modification means compromises between legislative actors where specific articles or annexes insert more national control, more national discretion, exemptions or special rules (Martinsen 2015: 35-36). Such mitigating articles confines the implications of the case law nationally and in its practical application. For example, the expansive *Grzelczyk* ruling (C-184/99) from 2001 laid down that Union citizenship entitles students from other member states to the social assistance of a hosting member state if a certain link with the society of their host state has been established. Soon after, however, the member governments constructed a delicate compromise with the European parliament in the Citizenship directive 2004/38 (Wasserfallen 2010), where article 24.2 aimed to modify the implications of the Court ruling by stating that member states are not obliged to confer entitlement to study grants or student loans before permanent residence has been acquired. Modification thus expresses governmental contestation to Court rulings, but is still a milder form of political pushback than upright rebellion against the authority of the Court. Moreover, there is increasing evidence that the impact of the Court's citizenship jurisprudence was limited from the beginning due to restrictive implementation at the domestic level (Heindlmaier and Blauburger 2017; Martinsen et al. 2018).

Moving beyond the area of EU citizenship, we also find examples of more severe measures to limit the Court's impact by legal means. Most often, the threshold to agree on legislative override is too high for member state governments, which is why they resort to modification as a second best option. And yet, there are some examples of legislative override. Again gender equality is illustrative, where the political receptiveness of legal innovations ended abruptly with the adoption of the Maastricht treaty in 1993. The Court's *Barber* case (C-262/88) from 1990 had laid down that the principle of equal treatment also applied to age of retirement. This time, member states and employers argued strongly against the Barber case's conclusions and the member states unanimously adopted the Barber

protocol in the Maastricht Treaty to limit the implication of the judgement (Craig and De Búrca 2011 864). Governments may also try to weaken the relative importance of the Court for the integration process more generally. For example, they restricted the power of the Court when they excluded its jurisdiction from two of the three Maastricht Treaty pillars (Burley and Mattli 1993).

#### (IV) Constraining consensus

Finally, the Court faces a ‘constraining consensus’ under very particular circumstances – namely, if the Court is continuously supplied with new cases in an area, in which further integration is opposed simultaneously by more member governments and public opinion. In this situation, the Court has to make decisions without, however, law serving as a mask or shield insulating the Court from governmental and public opposition. By extending integration through law regardless of political and public opposition, the Court would even exacerbate politicization. As a consequence, the Court is likely to be responsive and to exert self-restraint in face of strongly voiced political and public objections.

In the area of free movement and cross border welfare, legal integration for many years advanced not only the social rights of workers but also of non-economically active EU citizens. Based on European citizenship enshrined in the Treaty, the Court was heralded for adding real rights and substance to an otherwise empty political concept. In core cases, such as *Martínez Sala* (C-85/96), *Grzelczyk* (C-184/99), *Baumbast* (C-413/99) and *Trojani* (C-456/02), the Court extended the principle of equal treatment to lawfully residing Union citizens, not on the basis of their economic activities but ‘purely’ as citizens of the Union. It thus declared that Union citizenship as ‘destined to become the fundamental status of nationals of the Member States’ (*Grzelczyk*, para. 31). However, during the last five years political and public critique against free movement and cross border welfare rights has sounded louder. Member state governments, not the least from the UK, had already called for greater national discretion regarding the regulation of EU migrants’ welfare access for several years. In addition, between 2013 and 2015, the public debate around the theme of ‘welfare migration’ increasingly politicized EU citizens entitlements to welfare in a hosting member state in several member states (Blauberger et al. 2018). ‘Welfare tourism’ came to feature as a negatively framed concept in the public debate. At the same time, the recent citizenship jurisprudence shows that the CJEU is not immune to the public temper. The previously expansive Union citizenship jurisprudence has turned into a remarkably restrictive course of legal integration with the cases of *Dano* (C-333/13) in November 2014, *Alimanovic* (C-67/14) in September 2015, *Garcia-Nieto* (C-299/14) in April 2016 and in June 2016 with the *Commission v. UK* (C-308/14) infringement case. The Union citizenship of the treaty is no longer the reference point in the Court cases; instead the later restrictive interpretations are based on the conditions of secondary legislation as stated in the Citizenship directive. In its restrictive case law on

free movement and cross border welfare, the Court not only proves attentive to the EU legislature, but sensitive to the broader political context and has turned away from expanding right of non-economically active EU citizens (Blauberger et al. 2018).

The 'Laval quartet' was already discussed above as it provided interested governments with a short-term opportunity to mask their own preference and to shift the blame for unpopular decisions to the CJEU. In the longer run, however, the Court could not sustain its expansive jurisprudence as it became confronted with a constraining consensus. The Court's judgments triggered unprecedented public criticism (Scharpf 2008) as well as resistance by a significant number of member states. In 2012, the Commission's attempt to codify the Court's case law in the so-called 'Monti II Regulation' led to the first activation ever of the Early Warning Mechanism by twelve national parliaments. When asked to further clarify its interpretation of the Posted Workers Directive in subsequent cases, the Court 'readjusted its position to the benefit of national social regulatory autonomy' (Garben 2017: 38). In the case *Elektrobudowa* (C-396/13), the Court sided with the claims of a Finnish trade union and adopted an unexpectedly generous interpretation of what could be subsumed under the crucial term of 'minimum rates of pay'. In response to the *Rüffert* judgment (C-346/06), most German regions revised their public procurement legislation in order to protect as much as possible of its original substance in an EU-compatible way (Blauberger 2012: 118). When this legislation was challenged again in the *Regiopost* case (C-115-/14), the Court disagreed with the Commission and shifted its previous position: 'To avoid an explicit and principled reversal of its case law, the Court confines the ruling to the specific facts (...) But even if the extent to which Laval, Rüffert, Luxembourg and Bundesdruckerei have been overturned is open to discussion, the permissive signal to Member States and their courts is a strong one' (Garben 2017: 39).

Finally, another politically sensitive area, in which the Court appears to exert self-restraint in anticipation of (rather than in response to) a constraining consensus, is the area of fundamental rights. Member state governments have been cautious not to facilitate unwarranted CJEU intervention into domestic affairs and limited the scope of application of the Charter of Fundamental Rights of the EU 'to the Member States only when they are implementing Union law' (Article 51 of the Charter). Obviously, any attempt to extend the Charter's scope of application through case law hinges on the interpretation of when member states 'are implementing Union law' and the Court has raised some expectations that it might adopt an expansive interpretation (e.g. in the *Åkerberg Fransson* case, C-617/10). Yet, in contrast to these expectations and despite numerous 'invitations' to do so, the Court has so far refrained from an extensive interpretation of Article 51 of the Charter. Apart from the (lack of) legal basis, the current CJEU judge von Danwitz justifies the Court's restraint with a more or less

explicit reference to the potential politicization which could be caused by greater judicial activism (von Danwitz 2014).

## Conclusion

25 years have passed since Burley and Mattli first presented legal integration to function as a mask and a shield (Burley and Mattli 1993). Since then, political awareness of the outcomes of integration through law has grown significantly and EU legislative actions as well as national counter-actions limit the political power of the Court. Member states have become more skillful in penetrating the shield of law and as EU integration has moved into core areas of national sovereignty, the political implications of jurisprudence have become harder to mask. Public opinion increasingly forms for or against EU policies in general and partly even for or against specific judicial interpretations. As a consequence, growing politicization has become an additional scope condition for the CJEU to acknowledge and, under peculiar circumstance, a 'constraining consensus' may restrict the possible outcomes of integration through law, when public politicization is paralleled by member state opposition to expansive CJEU jurisprudence.

The judges in Luxembourg are not immune to this 'constraining consensus'. The CJEU appears to be sensitive to changes in the broader political context. This is not to say that the European Court has become or is likely to become politicized itself in the sense of taking a more ideological political side, but rather that public politicization constrains the CJEU's ability to promote integration through law. Ultimately, the Court's legitimacy depends on its jurisprudence being accepted and complied with and there is only that much opposition a judicial authority can take. Moreover, once an issue has already become broadly politicized, we should not overestimate the Court's ability to simply depoliticize it again by the mere force of law. Hence, despite the function of law as a mask and shield, growing politicization as a scope condition is largely exogenously given for the Court.

## Biographical notes

Michael Blauberger is Professor at the University of Salzburg ((<https://orcid.org/0000-0002-3581-400X>). Dorte S. Martinsen is Professor at the University of Copenhagen (<https://orcid.org/0000-0002-2113-0950>).

### **Address for correspondence**

Michael Blauburger, Salzburg Centre of European Union Studies, University of Salzburg,  
Mönchsberg 2, 5020 Salzburg, Austria. Email: [michael.blauberger@sbg.ac.at](mailto:michael.blauberger@sbg.ac.at).

### **Acknowledgements**

We would like to thank Christine Reh, R. Daniel Kelemen and three anonymous reviewers for their very helpful comments.



## References

- Alter, K. J. (1998a) 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts: Doctrine and Jurisprudence. Legal Change in its Social Context*. Oxford: Hart Publishing, pp. 227-252.
- Alter, K. J. (1998b) 'Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice', *International Organization* 52(1): 121-147.
- Alter, K. J., Helfer, L. and Madsen, M. R. (eds.) (2018) *International Court Authority*, Oxford, Oxford University Press.
- Blauberger, M. (2009) 'Of 'Good' and 'Bad' Subsidies: European State Aid Control through Soft and Hard Law', *West European Politics* 32(4): 719-737.
- Blauberger, M. (2012) 'With Luxembourg in Mind ... The Remaking of National Policies in the Face of ECJ Jurisprudence', *Journal of European Public Policy* 19(1): 109-126.
- Blauberger, M., Heindlmaier, A., Kramer, D., Martinsen, D. S., Sampson Thierry, J., Schenk, A. and Werner, B. (2018) 'ECJ judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence', *Journal of European Public Policy* 25(10): 1422-1441.
- Bresanelli, E., Koop, C. and Reh, C. (2019) 'EU Actors under Pressure: Politicisation and Depoliticisation as Strategic Responses', [this issue](#).
- Burley, A.-M. and Mattli, W. (1993) 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization* 47(1): 41-76.
- Carrubba, C. J. and Gabel, M. J. (2015) *International Courts and the Performance of International Agreements. A General Theory with Evidence from the European Union*, New York: Cambridge University Press.
- Cichowski, R. A. (2004) 'Women's Rights, the European Court, and Supranational Constitutionalism', *Law & Society Review* 38(3): 489-512.
- Conant, L. (2002) *Justice Contained: Law and Politics in the European Union*, Ithaca, NY: Cornell University Press.
- Conant, L., Hofmann, A., Soennecken, D. and Vanhala, L. (2018) 'Mobilizing European Law', *Journal of European Public Policy* 25(9): 1376-1389.
- de Wilde, P., Leupold, A. and Schmidtke, H. (2016) 'Introduction: the Differentiated Politicisation of European Governance', *West European Politics* 39(1): 3-22.
- Dederke, J. (2018) *Media Attention against all Odds, or Politicization as Usual? Introducing Case Salience Data for CJEU Cases*, Paris: Paper presented at the ECPR-SGEU conference, 13-15 June 2018.
- Dumbrovsky, T., Petkova, B. and Van der Sluis, M. (2014) 'Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States', *Common Market Law Review* 51(2): 455-482.
- Ferejohn, J. (2002) 'Judicializing Politics, Politicizing Law', *Law and Contemporary Problems* 65(3): 41-68.
- Garben, S. (2017) 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', *European Constitutional Law Review* 13(1): 23-61.
- Heindlmaier, A. and Blauberger, M. (2017) 'Enter at your own risk: free movement of EU citizens in practice', *West European Politics* 40(6): 1198-1217.
- Hofmann, A. (2018) 'Resistance against the Court of Justice of the European Union', *International Journal of Law in Context* 14(2): 258-274.
- Hooghe, L. and Marks, G. (2009) 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus', *British Journal of Political Science* 39(1): 1-23.
- Kelemen, R. D. (2011) *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Cambridge: Harvard University Press.

- Kelemen, R. D. (2012) 'The Political Foundations of Judicial Independence in the European Union', *Journal of European Public Policy* 19(1): 43-58.
- Kelemen, R. D. (2016) 'The Court of Justice of the European Union in the Twenty-First Century', *Law and Contemporary Problems* 79(1): 117-140.
- Larsson, O. and Naurin, D. (2016) 'Judicial Independence and Political Uncertainty: How the Risk of Override Impacts on the Court of Justice of the EU', *International Organization* 70(1): 377-408.
- Larsson, O. and Naurin, D. (2019) 'Split Vision: Multidimensionality in the European Union's Legal Policy Space', *International Studies Quarterly* early view online: 1-15.
- Larsson, O., Naurin, D., Derlén, M. and Lindholm, J. (2016) 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union', *Comparative Political Studies* 50(7): 879-907.
- Lindstrom, N. (2010) 'Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?', *Journal of Common Market Studies* 48(5): 1307-1327.
- Madsen, M. R., Cebulak, P. and Wiebusch, M. (2018) 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', *International Journal of Law in Context* 14(2): 197-220.
- Martinsen, D. S. (2015) *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union*, Oxford: Oxford University Press.
- Martinsen, D. S., Rotger, G. P. and Thierry, J. S. (2018) 'Free movement of People and Cross-Border Welfare in the European Union: Dynamic Rules, Limited Outcomes', *Journal of European Social Policy*.
- Mattli, W. and Slaughter, A.-M. (1998) 'Revisiting the European Court of Justice', *International Organization* 52(1): 177-209.
- McGuire, K. T. and Stimson, J. A. (2004) 'The least dangerous branch revisited: New evidence on Supreme Court responsiveness to public preferences', *Journal of Politics* 66(4): 1018-1035.
- Pierson, P. (1996) 'The Path to European Integration: A Historical Institutional Perspective', *Comparative Political Studies* 29(2): 123-163.
- Rasmussen, M. (2017) 'How to enforce European law? A new history of the battle over the direct effect of Directives, 1958–1987', *European Law Journal* 23(3-4): 290-308.
- Sack, D. (2012) 'Europeanization Through Law, Compliance, and Party Differences. The ECJ's 'Rüffert' Judgment (C-346/06) and Amendments to Public Procurement Laws in German Federal States', *Journal of European Integration* 34(3): 241-260.
- Scharpf, F. W. (2008) 'Der einzige Weg ist, dem EuGH nicht zu folgen', *Mitbestimmung* 54(7+8): 18-23.
- Schmidt, S. K. (2012) 'Who cares about nationality? The path-dependent case law of the ECJ from goods to citizens', *Journal of European Public Policy* 19(1): 8-24.
- Seikel, D. (2015) 'Class struggle in the shadow of Luxembourg. The domestic impact of the European Court of Justice's case law on the regulation of working conditions', *Journal of European Public Policy* 22(8): 1166-1185.
- Stein, E. (1981) 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law* 75(1): 1-27.
- Stone Sweet, A. (2010) 'The European Court of Justice and the Judicialization of EU Governance', *Living Reviews in European Governance* 5(2): 1-54.
- von Danwitz, T. (2014) 'The Rule of Law in the Recent Jurisprudence of the ECJ', *Fordham International Law Journal* 37(5): 1311-1346.
- Wasserfallen, F. (2010) 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-making in the European Union', *Journal of European Public Policy* 17(8): 1128–1146.
- Weiler, J. H. H. (1991) 'The Transformation of Europe', *The Yale Law Journal* 100(1): 2402-2483.
- Weiler, J. H. H. (1994) 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', *Comparative Political Studies* 26(4): 510-534.

- Weiler, J. H. H. (2013) 'Epilogue: Judging the Judges - Apology and Critique', in M. Adams, H. de Waele and J. Meeusen (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*. Oxford: Hart Publishing, pp. 235-254.
- Wollenschläger, F. (2011) 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration', *European Law Journal* 17(1): 1-34.